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Decision

Matter of: Zolon Tech, Inc.

File: B-299904.2

Date: September 18, 2007

J. Patrick McMahon, Esq., and William T. Welch, Esq., Barton, Baker, McMahon & Tolle, LLP, for the protester.

John E. Jensen, Esq., Daniel S. Herzfeld, Esq., and Kelly E. Buroker, Esq., Pillsbury Winthrop Shaw Pittman LLP, for Vistrionix, Inc., an intervenor.

Heather M. Self, Esq., Department of Agriculture, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably assessed weaknesses in evaluation of protester's experience as to core technology, where firm intended to rely on experienced consultant instead of contractor personnel, and as to management system, where firm's initial quotation did not address the system and oral presentation/revised quotation included only limited reference to it.
2. Price evaluation that determined protester's prices to be unrealistic was unobjectionable where based on both firm's low revised draft task order price, as compared to government estimate, and sample of firm's loaded labor rates, which were significantly lower than those of incumbent contractors.
3. Agency determination that small business's unrealistically low price represented high risk, and decision to make award to vendor with technically superior, higher-priced quotation were part of a comparative best value evaluation, not a responsibility determination requiring referral to the Small Business Administration.

DECISION

Zolon Tech, Inc. protests the establishment of a blanket purchase agreement (BPA) with Vistrionix, Inc. under request for quotations (RFQ) No. AG-3144-S-07-0012, issued by the Department of Agriculture, Natural Resources Conservation Service (NRCS), for information systems development, support, and maintenance services. Zolon challenges the technical and price evaluations and the risk determination.

We deny the protest.

The RFQ contemplated the establishment, on a “best value” basis, of a single BPA against the successful vendor’s Federal Supply Schedule contract for a base year, with 4 option years. Work under the BPA was to be accomplished on the basis of task orders for technology, operations, and management support services, primarily in the areas of software and database analysis, design, development, integration, deployment, support, and maintenance at NRCS in Fort Collins, Colorado, and other locations across the country.

Quotations were to be evaluated under five factors--technical approach, past performance, socioeconomic business status, socioeconomic business status of the overall contractor team arrangement (if proposed), and price. Under the technical approach factor, quotations were to be evaluated on the vendor’s BPA master management plan, draft task order management and quality control plans, transition plan, and technical experience, including key personnel. Past performance was to be evaluated on the basis of how well vendors had performed work the same as or similar to that described in the statement of work. Price was to be evaluated for completeness, realism, and reasonableness based on each vendor’s BPA skill category listing and a lump-sum, fixed-price, level-of-effort price for a draft task order. Non-price factors were equal to one another and, combined, of greater weight than price. The importance of price was to increase with the degree of equality of the quotations under the non-price factors.

The agency received nine quotations and, after the initial evaluation, five--including Zolon’s and Vistrionix’s--were evaluated as strong, and included in the competitive range. The competitive range vendors were invited to make an oral presentation, which was evaluated along with final proposal revisions (FPR) from each. Vistrionix’s and two other vendors’ quotations were evaluated as “strong proposal, few weaknesses.” Technical Evaluation Board (TEB) Report at 00381. Based on its review and the consensus technical strengths and weaknesses of each of these quotations, the TEB concluded that they were technically equal and recommended award to any of the three vendors.

In making the initial best value determination, the contracting officer, as source selection authority (SSA), (following the administrative contracting officer’s (ACO) recommendation) eliminated both Zolon’s and another vendor’s quotation from further consideration, since both had lower technical ratings and Zolon’s was the highest-priced and the other was the lowest-priced, which was considered to pose a high risk to the government. As to the three higher- and equally-rated quotations, based on the ACO’s recommendations and her own review of the evaluation record, the SSA concluded that award to Vistrionix represented the best value based on its quotation’s technical strengths and lowest pricing among the three quotations.

When Zolon received its debriefing, the agency realized that the SSA had failed to consider that the firm had lowered its price by approximately \$1.2 million in its FPR. The agency therefore reconvened the TEB and reviewed all of Zolon's submissions. Based on the firm's technical weaknesses, the TEB recommended that, regardless of its pricing, Zolon's quotation was not the best value when compared to the three top-rated quotations. In making her amended best value determination, the ACO analyzed Zolon's lower pricing (lowest of all quotations) and found that a number of its proposed labor rates were lower than those under the incumbent contracts. She concluded that the proposed pricing structure was not realistic or reasonable and represented a high risk to the agency in terms of Zolon's ability to transition or retain incumbent personnel. Based on these pricing concerns and Zolon's technical weaknesses, she again recommended award to Vistronix. The SSA adopted the recommendation and made award to Vistronix. This protest followed.

Zolon asserts that the agency's technical and price evaluations, as well as the risk determination, were flawed. In considering a protest of an agency's evaluation, our review is confined to determining whether the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. United Def. LP, B-286925.3 et al., Apr. 9, 2001, 2001 CPD ¶ 75 at 10-11. The evaluation here was unobjectionable.

TECHNICAL EVALUATION

Zolon asserts that the agency improperly evaluated its quotation in the technical evaluation. Specifically, it asserts that the agency improperly assessed two weaknesses relating to its experience in Geographic Information Systems (GIS) and earned value management (EVM), despite its coverage of both areas in its quotation.

Zolon's assertions are without merit. With regard to GIS experience, the RFQ advised that each vendor was to provide evidence of experience in NRCS core technologies, including GIS web and client application development. RFQ at 00139. Vendors were also required to provide pricing in their draft task orders for three GIS specialist positions encompassing some 20,000 hours. RFQ at 00164. The TEB found Zolon's quotation to be weak in this area because it failed to mention any GIS projects, and because the relevance of the listed key personnel's experience, over 10 years old, was questionable. Agency Report (AR), Tab 9, at 00270, 00272-273. Zolon challenges the agency's conclusion, pointing to its proposal of a GIS technical expert from Colorado State University (CSU) as a resource in its local information technology (IT) pool; and the fact that he would chair the firm's senior advisory group and would be part of the CSU resources that would participate in all Zolon IT projects, providing "short and long term consultants and employees." Zolon Quotation at 00178, 00326. However, the agency was fully aware that Zolon proposed these CSU resources; it considered them of less than optimal value, since they were proposed in an advisory capacity and not as a subcontractor. Contracting Officer's Statement ¶ 27. Since 100 percent of contract performance was committed

to Zolon and its subcontractors, providing no guarantee that CSU would actually supply resources or expertise to the team, we think the agency reasonably found that Zolon lacked GIS experience and that this was a weakness in its quotation.

With regard to EVM, the draft task order made a number of references to EVM and agency expectations of contractors, including NRCS's use of an EVM system to report and track performance of investments under the task order and the contractor's responsibility to provide project managers with periodic EVM data to document the cost, schedule, and performance of work. RFQ at 00147. The TEB noted that Zolon's initial quotation contained no reference to EVM tools currently in use by the firm (AR, Tab 9, at 00269) and that, despite a specific request for additional information related to EVM (AR, Tab 10, at 00276), Zolon's oral presentation contained only limited reference to EVMs. In its final evaluation, the TEB questioned whether Zolon had a completely automated system to collect and report EVM, was concerned about its real-time reporting capabilities, and found unclear the firm's prior experience in actual use of an EVM system. AR, Tab 12, at 00314. Zolon asserts that its oral presentation, including four slides depicting its EVM approach, demonstrated its experience and ability to implement EVM in performing under the BPA. However, the agency notes that the slides appeared to consist largely of industry standard textbook diagrams and that, during the oral presentation, when the TEB asked about the link between Zolon's paper-based timekeeping system and its EVM system, no one present from the Zolon team could answer the question. Supplemental Contracting Officer's Statement ¶ 5. In view of Zolon's failure to include any EVM information in its initial quotation, use of standard diagrams, and its inability to answer the TEB's question, the agency reasonably found a weakness in the firm's quotation regarding EVM.

PRICE REALISM EVALUATION

Zolon asserts that the agency misevaluated its price proposal as unrealistically low based on a number of alleged errors. Where, as here, award is to be made on a fixed-rate basis, the realism of vendors' proposed labor rates is not ordinarily considered, since the risk and responsibility for contract costs and resulting profit or loss rests on the contractor. PharmChem, Inc., B-291725.3 et al., July 22, 2003, 2003 CPD ¶ 148 at 7. However, an agency may, at its discretion, provide for the use of a price realism analysis under a fixed-rate solicitation for various reasons, such as to assess the risk in a vendor's approach. Id. The nature and extent of an agency's price realism analysis are matters within the agency's discretion, and our review is limited to determining whether the evaluation was reasonable and consistent with the solicitation's evaluation criteria. Uniband, Inc., B-289305, Feb. 8, 2002, 2002 CPD ¶ 51 at 4.

The price realism analysis conducted here was unobjectionable. The agency noted that Zolon's overall draft task order price was reduced by over \$1.2 million (9.4 percent) from its initial quotation and that its revised price was some \$638,000

(5 percent) lower than the government's estimate, an amount the agency considered significant. Best Value Determination at 00389; Supplemental Contracting Officer's Statement ¶¶ 1 and 3a. The agency also compared Zolon's individual labor rates to the incumbent rates for six key (*i.e.*, the largest number of hours) skill categories.¹ In making this comparison, the agency found that Zolon's rates were 10, 24, 26, 27, 34 and 43 percent lower than the rates under the incumbent contracts.² Best Value Determination at 00390. Based on this analysis, the agency concluded that Zolon's pricing represented a high risk to successful transition and retention of incumbent personnel. *Id.* at 00389. In this regard, the agency noted that most incumbents had been in place for a number of years and that their billing rates reflected their long experience and expertise. *Id.* at 00390. The agency was concerned that, if the firm were unable to match or slightly increase compensation upon transition due to pricing constraints, the loss of the incumbent resources would cause a severe hardship to the government with a large impact on accomplishing the agency's mission. *Id.* In our view, the agency's conclusions were reasonable and consistent with the evaluation criteria in the RFQ. That is, we think the agency reasonably could find that the deviation in Zolon's rates from the rates it was currently paying under the incumbent contracts brought into question whether the firm would be able to transition and retain the incumbent workforce, both considerations inherent in the price realism evaluation.³

¹ These were the senior system analyst, senior system architect, senior programmer, programmer, junior programmer, and senior database administrator.

² Zolon criticizes a number of these percentages, noting that some were rounded up; some were based on the higher of the two incumbent rates instead of the average; some failed to account for the difference between the rates for a senior and regular programmer; and some used offsite, instead of more appropriate onsite, rates. Zolon Comments at 9-11. While the agency concedes some of these matters and otherwise explains its bases for making its comparisons, we need not resolve these issues, since it does not appear that Zolon was prejudiced. *See McDonald-Bradley*, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3 (GAO will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions); *see Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1581 (Fed. Cir. 1996). In this regard, the agency's recalculation of all the comparisons, consistent with Zolon's criticisms, resulted in rates 4.46, 11.94, 21.57, 23.35, 25.40, and 33.76 percent lower than the incumbent's. Supplemental Contracting Officer's Statement at 00416. In our view, these percentages are sufficiently similar to those relied upon by the agency and do not affect our analysis above.

³ Zolon asserts that the agency improperly evaluated its pricing as unreasonable, since its price was lower than the government estimate and price reasonableness concerns whether a price is higher, not lower, than warranted. *See Dismas Charities, Inc.*, B-289575.2, B-289575.3, Feb. 20, 2004, 2004 CPD ¶ 66 at 4. While low prices are not an indication of price unreasonableness, the protester was not

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Zolon asserts that the agency's failure to consider the cost elements of its loaded labor rates led it wrongly to assume that the firm would have to pay incumbent personnel less than they currently receive. Specifically, Zolon notes that, with its low overhead and G&A rate, it could offer prospective employees higher salaries than the incumbents currently pay. It also notes that its quotation included a plan for hiring/retaining incumbent workers, and reported its past successes in retaining incumbent personnel.

Zolon's assertions are without merit. While its overhead and other aspects of its loaded labor rates may be lower than those of the incumbents, the RFQ did not request any of these cost elements. Since the RFQ only requested loaded rates, Zolon was on notice that any realism analysis would be based on those rates and not on individual cost elements; indeed Zolon's quotation did not include the cost element information it claims the agency should have considered. To the extent Zolon is challenging the failure to request the information or include it in its evaluation, its protest is untimely; protests of solicitation improprieties must be filed prior to the closing time for receipt of quotations. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2007). We note moreover, that the ACO in fact specifically concluded that the price difference between the government estimate and Zolon's revised draft task order, and Zolon's lowered skill category pricing, were too low to be accounted for by a small business's lower overhead rate. Supplemental Contracting Officer's Statement ¶ 1. As for the firm's incumbent worker retention plan, the TEB found it inadequate, noting that its transition experience was limited and its actual experience was on a smaller scale than would be required in this procurement. *Id.* ¶ 2. Based on this information, the agency reasonably concluded that Zolon's revised pricing represented a risk with regard to transitioning and retaining the incumbent workforce.⁴

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prejudiced by the agency's evaluation. See McDonald-Bradley, *supra*; Statistica, Inc. v. Christopher, *supra*. As discussed above, the agency reasonably concluded that Zolon's low pricing was unrealistic and risky; its additional conclusion that the pricing was unreasonable had no discernible negative impact on the price evaluation.

⁴ Zolon also asserts that the TEB improperly considered the firm's revised price in its reevaluation of Zolon's quotation after it was reconvened, and that the ACO and SSA used this as a substitute for a proper and reasonable price evaluation. Zolon Comments at 12. There was nothing improper in the TEB's evaluation. When reconvened, the TEB reviewed all of Zolon's submissions and, after identifying the same weaknesses and noting the presence of three higher-rated quotations, recommended that award to Zolon would not be the best value, regardless of its lower price. TEB Report at 00384. While this recommendation included an assessment that Zolon's price did not outweigh its weaknesses, the essence of the TEB's evaluation was technical; it did not usurp the SSA's responsibility to make the
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Zolon asserts that the evaluation also was flawed because the agency failed to compare Vistronix's labor rates with the incumbents'. Zolon is incorrect. The record shows that the agency compared all 22 rates of the top three quotations, including Vistronix's, with the incumbents' onsite and offsite rates. Best Value Determination at 00395. While Vistronix's rates are lower than the incumbents', with regard to the six key categories used in the price realism evaluation, the awardee's rates ranged from only 1.12 to 33.15 percent below the average current billing rates.⁵ Further, only two of Vistronix's rates were more than 15.5 percent below the average. (We note that Zolon's rates ranged from 10 to 43 percent lower and included four that were more than 15.5 percent lower.) In addition, Vistronix's draft task order price was higher than the government estimate. The agency concluded that Vistronix's labor category rates would be closely in line with the current contracts, with only a few significantly higher or lower outliers. Supplemental Contracting Officer's Statement ¶ 3a. Under these circumstances we find nothing unreasonable in the agency's price evaluation.

RISK DETERMINATION

Zolon asserts that the agency's determination that its revised price was unrealistic and risky constituted a finding that the firm was not responsible. In this regard, Zolon notes that, in making the best value determination, the agency found that the firm's pricing structure would make it very difficult or impossible to transition a large percentage of the incumbent personnel to a new contract, and was highly unlikely to allow the firm to meet the government's performance standards. Zolon also notes that the agency considered its past performance and experience to be deficiencies that it could not overcome. Zolon concludes that since it is a small business, the agency was required to refer the matter of its responsibility to the

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best value tradeoff determination. In this regard, as discussed above, the ACO fully considered and analyzed representative portions of Zolon's revised pricing before concluding that it represented a high risk to the government. When this risk assessment was coupled with Zolon's technical weaknesses, the ACO recommended award to Vistronix with its higher priced, higher technically rated quotation. Since the RFQ placed greater importance on technical superiority, the SSA's agreement with the ACO's award recommendation was reasonable.

⁵ The percentage differences between Vistronix's and the incumbents' rates are even smaller under the agency's recalculated comparison (see footnote 2). Using onsite, average rates as the comparison points, Vistronix's rates were only 1.12, 4.8, 7.95, 9.64, 21.51, and 23.03 percent lower. Supplemental Contracting Officer's Statement at 00416.

Small Business Administration (SBA) for review under its certificate of competency procedures. See Federal Acquisition Regulation § 19.602-1(a).

Zolon's assertions are without merit. An agency may use traditional responsibility factors, such as personnel competencies and capabilities, as technical evaluation factors where, as here, a comparative evaluation of those areas is to be performed. Advanced Resources Int'l, Inc.-Recon., B-249679.2, Apr. 29, 1993, 93-1 CPD ¶ 348 at 2. A comparative evaluation means that competing proposals will be rated on a scale relative to each other rather than on a pass/fail basis. Dynamic Aviation Helicopters, B-274122, Nov. 1, 1996, 96-2 CPD ¶ 166 at 3. No SBA referral is required where a small business offeror's proposal, while evaluated as acceptable, is not selected for award because another offeror's proposal is evaluated as superior under a comparative analysis or because of a cost/technical tradeoff analysis. Capitol CREAG LLC, B-294958.4, Jan. 31, 2005, 2005 CPD ¶ 31 at 6-8. There was no pass/fail evaluation here; the record shows that evaluation of Zolon's past performance and experience, as well as the price realism and risk assessment based on the firm's low proposed labor rates, were all part of a comparative, best value evaluation, not a responsibility determination. Best Value Determination at 00385, 00389-390.

The protest is denied.

Gary L. Kepplinger
General Counsel